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Report on the 1993-1994 Supreme Court Labor and Employment Law Term

Joseph R. Grodin
UC Hastings College of the Law, grodinj@uchastings.edu

Author: Joseph R. Grodin

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Joseph R. Grodin*
University of California, Hastings College of the Law
San Francisco, California

I. Overview

Judged by the number of decided cases—an even dozen, if you count the abortion center picketing case with its implications for labor injunctions[1]—last Term was a more productive one for the U.S. Supreme Court in the labor and employment law fields than any Term in recent years. Furthermore, contrary to recent trends, half the cases involved what we have come to call "old fashioned labor law," and the collective bargaining relationship.

While the Term held no great surprises, or significant groundbreakers, all of the cases can be seen as significant, in terms either of their immediate holdings or their implications for future legal developments. In companion cases, *Landgraf v. USI Film Products*[2] and *Rivers v. Roadway Express*,[3] the Court dashed the hopes of thousands of plaintiffs (not to speak of plaintiffs' lawyers) by holding that sections 101 and 102 of the 1991 Civil Rights Act could not be applied to acts of discrimination occurring prior to the enactment of the statute. In *Harris v. Forklift Systems*,[4] the Court articulated standards, albeit vague, for evaluating hostile working environment claims under Title VII and thereby made it easier, in some circuits, for plaintiffs to win on sexual harassment charges, while in *Howlett v. Birkdale Shipping Co.*,[5] the Court made it more difficult for plaintiffs to prevail in negligence claims against a shipowner under the Longshore and Harbor Workers Compensation Act. In *NLRB v. Health Care and Retirement Corp.*,[6] the

*Dr. Grodin is professor of law at the University of California Hastings College of the Law in San Francisco and is the former section secretary of the ABA's Section of Labor and Employment Law.

1. *Madsen v. Women's Health Ctr.*, 114 S. Ct. 2516 (1994).
2. 114 S. Ct. 1483 (1994).
3. 114 S. Ct. 1510 (1994).
4. 114 S. Ct. 367 (1993).
5. 114 S. Ct. 2057 (1994).
6. 114 S. Ct. 1778 (1994).

Court overturned the agency's interpretation of the statutory definition of "supervisors" as applied to nurse professionals, and as a result put a major crimp in union organization of the health care industry. In *Department of Defense v. FLRA*,[7] the Court held that a union representing employees of a federal agency is not entitled to the names and addresses of unit employees, and the implications of the opinion may go further in restricting the sorts of information that a union in the federal public sector may obtain. In *ABF Freight Co. v. NLRB*,[8] the Court saved us from the unworkable prospect of the NLRB being required to deny relief to parties represented by lying witnesses. In *Livadas v. Bradshaw*,[9] the Court held that a state labor commissioner violated employees' federal rights by refusing to process wage claims on behalf of employees covered by collective bargaining agreements containing an arbitration clause, and in the process of so holding may have laid the groundwork for reevaluation (and containment) of the section 301 preemption doctrine. In *Hawaiian Airlines v. Norris*,[10] the Court declined to adopt the employer's theory, which would have brought about a major shift in decisionmaking authority, that the Railway Labor Act requires arbitration of state employment law claims. In *Waters v. Churchill*,[11] a controlling plurality opinion introduced a modified conceptual framework, including a procedural component, into the analysis of First Amendment claims of public employees. And finally, in *United Workers v. Bagwell*,[12] the Court explored, albeit without discovering a great deal, the shadowy line between civil and criminal contempt in the context of labor injunctions.

The cases are diverse, and meaningful generalizations are difficult. One can look at the results—in the important cases unions and plaintiffs tended to be the losers—and conclude that the court remains, in one sense of the term, conservative in its ideology. Additionally, one can look at the votes and conclude that in terms of results, Justice Blackmun's departure is not likely to make a difference. In all but two of the cases, the decisions were either unanimous (leaving minor differences reflected in concurrences aside) or nearly unanimous, with only Justice Blackmun dissenting. In one of the two cases in which the Court was more evenly divided, *Health Care*, Justice Blackmun was part of the four-Justice dissent along with Justices Ginsburg, Souter, and Stevens. In the other case, *Waters*, Justice Blackmun joined with Justice Stevens to assert a pro-employee position while Justices Scalia, Kennedy, and Thomas defended the employer's position, and the deadlock was broken

7. 114 S. Ct. 1006 (1994).
8. 114 S. Ct. 835 (1994).
9. 114 S. Ct. 2968 (1994).
10. 114 S. Ct. 2239 (1994).
11. 114 S. Ct. 1878 (1994).
12. 114 S. Ct. 2552 (1994).

by a plurality middle position advanced by Justice O'Connor and joined by Justices Souter, Ginsburg, and Rehnquist. Such a three-way split is rare in labor and employment cases; it is more common in constitutional cases, which this case happened to be.

The Court is in a process of transition. Two Justices who played a major role in prior labor and employment law decisions—Brennan and White—are no longer there. The absence of Justice Brennan's strong voice is particularly noticeable in the rather bland quality and unanimity of some of the opinions. Three Justices—Thomas, Souter, and Ginsburg—are relatively new to the Court, and at least two of these are still in the process of defining their identity within the institution. Perhaps that helps account for the qualities of tentativeness and cautiousness that often appear, including a reluctance to decide more than is necessary, even when additional guidance would be useful, and a consequent fact specificity that is occasionally frustrating. Judicial conservatism, in another sense of the term, may also play a role in the Court's style, as well as a determination, on the part of some Justices, at least, to locate a consensus position. Consensus positions, in the face of diversity of viewpoints, implicate a search for the lowest common denominator.

The prize for the best opinion of the year, in this area of law, is won easily by Justice Souter for his thorough and thoughtful examination in *Livadas* of the always-troubled fault line that lies between labor and employment law. His opinion displays an understanding of the deeper issues and policies involved, and a quality of openness to suggestions for change, which is not otherwise characteristic of this Court.

The prize for most wooden opinion of the year goes to Justice Thomas, for his opinion in *Department of Defense v. FLRA*. By relying upon a rather sterile statutory analysis, and upon precedent which several lower courts found possible to distinguish, the opinion manages to produce a result that it is hard to believe Congress intended.

The remarkable fact is that both opinions were unanimous. Perhaps that tells us more about the current Court than any statistics.

II. Labor Management Relations Act

ABF Freight System, Inc. v. NLRB[13]

The issue before the Court was whether the NLRB is obligated to withhold the remedy of reinstatement with back pay from a section 8(a)(3) discriminatee because the employee lied in the NLRB hearing. The Court, with grumbling from a few Justices, upheld the Board's discretion.

Michael Manso may have set an all-time record for being discharged and reinstated. During his two-year tenure as a casual dockworker at ABF Freight's Albuquerque trucking terminal he was fired

13. 114 S. Ct. 835 (1994).

three times. First, he was discharged along with twelve other casual dockworkers in a dispute over a contract provision, but was reinstated after his union filed a grievance. Then, he was fired again, this time ostensibly for failing to respond to a call to work. His union, however, filed a grievance and a grievance panel put him back to work.

Two months later, Manso came to work an hour late for the 5:00 a.m. shift. Manso had telephoned at 5:25 to say that he was having car trouble on the highway, but the company investigated, decided he was lying, and fired him for tardiness under a newly adopted policy applicable only to casual dockworkers: two strikes of tardiness and you're out. Manso had in fact been tardy on the same shift six days earlier, when he showed up four minutes late. The company adopted the new policy shortly after that incident.

Manso and his union filed section 8(a)(3) charges with the Board, claiming that the reasons the company gave for both the second and third discharges were pretextual; that both discharges, and indeed the adoption of the new tardiness policy itself, were undertaken in retaliation for Manso's protected activity in the first incident, when he joined in the grievance protesting the discharge of the twelve employees.

A complaint issued, and at the trial Manso repeated his story as to why he was late. The ALJ found that story to be a lie. The ALJ agreed with Manso that his second discharge was unlawful for the reasons asserted by Manso, but agreed with ABF that his third discharge was for cause, namely for lying to his employer. The Board sustained the ALJ's finding that Manso's second discharge was unlawful, and concluded (contrary to the ALJ) that the third discharge was unlawful as well—that while the employer *might* have fired Manso for lying it had not done so—and it ordered Manso's reinstatement with back pay.

On review by the Tenth Circuit, ABF argued that even if the Board's analysis were correct, the fact that Manso lied both to his employer and to the ALJ should, as a matter of public policy, preclude relief. The Tenth Circuit affirmed the Board's order, emphasizing the scope of the Board's discretion regarding remedies and noting that when Manso lied to his employer it was to escape application of a rule that was itself the product of antiunion animus.

Had the Supreme Court granted certiorari with respect to the full scope of ABF's arguments before the Tenth Circuit, it would have been obliged to consider the effect of an employee's misconduct toward his employer upon the employee's claim of discriminatory dismissal; that is an issue with potential ramifications for a broad range of employment discrimination laws. Instead, the Court's certiorari order and its opinion were limited to the issue of whether Manso's false testimony to the ALJ should have barred the order of reinstatement with back pay. The Court unanimously upheld the Board's order. Justice Stevens' opinion relied principally upon the propositions that Congress had expressly

delegated to the Board "primary responsibility for making remedial decisions that best effectuate the policies of the Act,"[14] and that under the *Chevron* principle[15] the Board's views consequently "merit the greatest deference."[16] The Board was not obliged to adopt a "rigid rule" that would foreclose relief in such cases, nor did the Board abuse its "broad discretion" in deciding to order Manso's reinstatement.[17]

For the Court to have decided the case otherwise is almost unthinkable. As anyone who has been involved in hearings knows, for witnesses to lie, consciously or otherwise, is hardly an uncommon event. To make the Board's power to award relief turn upon credibility findings would, as the opinion noted, "force the Board to . . . devote unnecessary time and energy to resolving collateral issues."[18] And what if witnesses for both sides are found to be lying? As the opinion also noted, the Board in this case had made credibility findings against several ABF witnesses, so that there would be an element of unfairness in "sanctioning Manso while indirectly rewarding those witness' lack of candor."[19]

Nonetheless, Justice Scalia, joined by Justices O'Connor and Kennedy, found it appropriate to write separately to castigate the Board for what they viewed as the agency's casual tolerance of perjury in its own proceedings. Justice Scalia's opinion ends with a characteristically pithy epigram: "I concur in the judgment of the Court that the NLRB did nothing against the law, and regret that it missed an opportunity to do something for the law."[20]

NLRB v. Health Care and Retirement Corp.[21]

The Taft-Hartley amendments to the NLRA exclude supervisors from coverage but include professionals. There is tension between these two positions, arising out of the statutory definition of "supervisor" as including one who uses independent judgment to assign and "responsibly . . . direct" the work of other employees "in the interest of the employer." Most professionals do some assignment and direction of others' work, and if that served to exclude them as supervisors from coverage of the Act, the categories of professionals who remain covered would likely be substantially reduced.

The NLRB resolved this tension in the case of nurses and certain other professional groups by a narrow reading of the phrase "in the interest of the employer." On the Board's reading, the assignment and

14. 114 S. Ct. at 839.
15. Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
16. 114 S. Ct. at 839.
17. *Id.* at 840.
18. *Id.*
19. *Id.*
20. *Id.* at 843.
21. 114 S. Ct. 1778 (1994).

direction of other employees by a professional does not by itself confer supervisory status, where that activity can be said to serve a professional interest of providing high quality and efficient service.[22] By the narrowest of margins, the Court, in an opinion by Justice Kennedy, rejects this reading as contrary to the statute.[23] Justice Ginsburg, joined by Justices Blackmun, Stevens, and Souter, dissented.

The case involved four licensed practical nurses who complained to the NLRB that their employer, the Heartland Nursing Home, had discriminated against them for union activities in violation of the Act. With five to seven registered nurses, they made assignments to nurses aides, monitored their work to ensure proper performance, counseled and disciplined them, evaluated their performance, and reported to management. The ALJ found nonetheless that they were employees rather than supervisors, because the authority they exercised focused on the well-being of the residents rather than the employer. The ALJ found the nurses' direction of aides "closely akin to the kind of directing done by leadmen or straw bosses, persons . . . Congress plainly considered to be employees."[24] The Board agreed, but the Court of Appeals for the Sixth Circuit reversed, thus creating a conflict with the Second, Seventh, and Eighth Circuits, all of which approved the Board's reading of the statute.

Without doubt there is a certain logical charm to the Court's position. After all, the Heartland Nursing Home is a for-profit enterprise, and whatever is done to improve the welfare of the residents could be said to further the interests of the owners as well. But if that is the case, what happens to the congressional determination to include professionals? And, if that is the case, what *does* the phrase "in the interest of the employer" mean?; or, more practically, what does it serve to exclude? If the Board's answer is not entirely satisfying, neither is the majority's suggestion that it serves to exclude union stewards who process grievances on behalf of employees. At least the Board's answer helps to resolve the tension between the definitions of supervisory and professional employees, whereas the majority's answer, while it preserves the possibility of negating supervisory status on other grounds, tends to exacerbate it.

The Court insists that the Board's interpretation is mainly confined to nurses' cases so that the decision will have little impact elsewhere.[25] That, as the dissent observes, is a debatable proposition; the Board has in fact relied upon its "interest of the employer" rationale in other cases as well.[26]

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22. *Id.*
23. *Id.*
24. Healthcare & Retirement Corp. of Am., 306 N.L.R.B. 70 (1992).
25. 114 S. Ct. at 1785.
26. *Id.* at 1792.

Beyond the debate over the meaning of the statutory language is the philosophy toward labor relations that the Court's opinion reflects. As the majority observes, the decision is in line with the Court's prior decision in *NLRB v. Yeshiva University.*[27] That decision has been frequently criticized as creating an unnecessary and undesirable dichotomy between those who work with their hands and those who work with their heads, and as tending to place obstacles in the way of new and experimental modes of worker participation in the management of the enterprise. That decision also, incidentally, had the effect of aborting the quite successful efforts of unions to organize university faculty. Coming at a time when the health care industry is one of the few promising areas for union organization, *Health Care*, even if its impact is confined to that industry, is likely to have a similar effect.

Livadas v. Bradshaw[28]

The issue presented by the facts in this case was a narrow one. Karen Livadas, who worked as a grocery clerk for Safeway Stores in Vallejo, California, was fired on January 2, 1990. Under California law she was entitled to immediate payment of wages due, and a penalty (in an equivalent amount) for tardy payment. Safeway, in accordance with its usual policy, mailed her a check that arrived three days later, on January 5. Subsequently, Ms. Livadas filed a claim with the state labor commissioner, claiming entitlement to the statutory penalty. The labor commissioner, however, refused to take action on her claim, on the ground that she was a member of a bargaining unit covered by a collective bargaining agreement that contained an arbitration clause.

In response, Ms. Livadas brought suit in federal district court under 42 U.S.C. § 1983, claiming that the commissioner's refusal on such grounds violated her rights under the National Labor Relations Act. The district court agreed and granted her summary judgment, but the Court of Appeals for the Ninth Circuit reversed. The Supreme Court granted certiorari and unanimously, in a finely crafted opinion by Justice Souter, reversed the Ninth Circuit.

The Court characterized the California labor commissioner's policy as a "state rule predicating benefits on refraining from conduct protected by federal law."[29] To the Court, this was as offensive to federal labor policy as the Florida rule, struck down in *Nash v. Florida Industrial Commission*, which withheld unemployment benefits solely because an employee had filed an unfair labor practice charge.[30] But, the most interesting parts of the opinion are those in which the Court

27. 444 U.S. 672 (1980) (holding that university professors are "managers" and thus are not entitled to protection under the Act).

28. 114 S. Ct. 2068 (1994).

29. 114 S. Ct. at 2074.

30. *Id.* at 2074 (*citing* Nash v. Florida Industrial Comm'n, 389 U.S. 235 (1967).

considers and rejects the various arguments tendered by the labor commissioner in justification.

The labor commissioner argued, among other things, that her policy of withholding jurisdiction from persons covered by collective bargaining agreements with arbitration clauses was not only permitted but required by federal law, because the assertion of jurisdiction in such cases would be preempted by section 301.[31] This was an easy argument to counter, simply on the basis of the Court's own prior case law. *Lingle v. Norge*[32] held that the test of a section 301 assertion is whether determination of the state law claim would require interpretation of the collective agreement; the fact that the tribunal might have to consider the agreement to compute an amount due the plaintiff was not enough to bar the claim.[33] The state law invoked by Ms. Livadas was independent of the agreement, there was no dispute about the amount of wages due her. Hence, the labor commissioner's argument could have been rejected in a single sentence, by citation to *Lingle*.

Instead Justice Souter's opinion does more: it summarizes and to some extent recasts the section 301 preemption doctrine in a way that signals a willingness to reconsider and perhaps to contain the scope of that doctrine, certainly to reorient its rationale. In *Lingle*, as in *Allis Chalmers v. Lueck*,[34] the Court posited section 301 preemption on the need for uniformity in interpreting collective bargaining agreements. The Court relied upon statements to that effect in *Teamsters v. Lucas Flour*.[35] But in *Lucas Flour*, the question was whether the existence of an arbitration provision implied a no-strike obligation over arbitrable matters.[36] That was a question intimately related to federal policy and its encouragement of peaceful settlement of industrial disputes. There is no such substantive federal policy involved in the run-of-the-mill section 301 preemption case, however, and it is not likely that Congress has placed or would place high value on ensuring that identical or similar provisions in different collective bargaining agreements be interpreted the same way. A more appropriate policy focus is not uniformity of interpretation as such, but the desire of the parties that it be the arbitrator, rather than a court, who interprets the agreement when interpretation is required. But arguably even that policy would not justify denying to a plaintiff access to otherwise applicable legal rights simply because he is covered by a collective bargaining agreement requiring interpretation, at least where there exist alternatives to that draconian result.

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31. *Id.* at 2077.
32. 486 U.S. 399 (1988).
33. *Id.*
34. 471 U.S. 202 (1985).
35. 369 U.S. 95 (1962).
36. *Id.*

Given the shaky basis of current section 301 preemption doctrine it is not surprising that the lower courts are all over the lot in their interpretation of *Lingle*, disagreeing as to how the interpretation test applies to defenses raised by the employer, to arguably implicit rather than explicit provisions of collective agreements, and so forth. The AFL-CIO, in an amicus brief in *Livadas*, called all of this to the Court's attention, and urged reconsideration of the *Lueck-Lingle* rationale. The Court declined to accept that invitation directly, but the language of the opinion presents a subtle shift in analysis. The court acknowledges that what it calls "this sensible 'acorn' of Section 301 preemption"—the proposition in *Lucas Flour* that state courts must follow federal law under section 301—has "sprouted modestly in more recent decisions of this court" (referring to *Lueck* and its proposition that the preemptive effect of section 301 must extend beyond suits alleging contract violations); but the court admonishes that

> it has not yet become, nor may it, a sufficiently 'mighty oak' . . . to supply the cover the Commissioner seeks here. To the contrary, *the preemption rule has been applied only to assure that the purposes animating Section 301 will be frustrated neither by state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement* (citing *Lueck*, at 211) *nor by parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective bargaining agreements.*[37]

What is noteworthy is that this is a quite limited statement of the preemption principle, and of the holding in *Lueck*. Moreover, the statement is supplemented by a footnote that acknowledges the AFL-CIO's brief and observes: "Holding the plaintiff's cause of action substantively extinguished may not, as the AFL-CIO observes, always be the only means of assuring the arbitrator's primacy as the bargained-for contract interpreter. *Cf. Collyer Insulated Wire, Gulf & Western Systems Co.*, 192 N.L.R.B. 837 (1971)."[38] If the body of the Court's opinion constitutes an admonishment not to view the section 301 preemption doctrine too broadly, the footnote may be viewed as an invitation to develop *Collyer*-like deferral arrangements when that doctrine, properly construed, calls for an issue of interpretation to be resolved by an arbitrator rather than by the courts.

The commissioner also argued that the state's "hands-off" policy with regard to claims of employees covered by collective bargaining agreements was justified as a means of giving effect to the parties' bargain, and as a means of maintaining neutrality.[39] The Court rejected both arguments, observing in the first argument that the state's policy

37. 114 S. Ct. at 2068–69 (emphasis added).
38. *Id.* at n.18.
39. *Id.* at 2079.

was not limited to disputes that the parties agreed would be resolved by arbitration, and in the second that labor law's "bias toward bargaining" is not "served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course."[40] With regard to the second point, the Court distinguished statutes such as the one upheld in *Fort Halifax Packing Co. v. Coyne*,[41] 482 U.S. 1 (1987), which permitted parties to collective agreements to bargain for different severance pay arrangements than otherwise required by state law. Such "opt-out" statutes, the Court observed, retain full protection for union-represented employees absent agreement for something different, and are thus distinguishable from the commissioner's policy of withholding protection on the basis of the mere existence of an agreement with provision for arbitration.[42]

Finally, the Court held that Ms. Livadas was entitled to relief under section 1983, as a "generally and presumptively available remedy for claimed violations of federal law."[43] The right that Livadas asserts—to complete the collective bargaining process and agree to an arbitration clause—is "at least as imminent [in the structure of the NLRA] as the right of the cab company in *Golden State II*."[44]

III. Railway Labor Act

Norris v. Hawaiian Airlines[45]

This case, like *Livadas*, lies along the troubled faultline between labor and employment law. Here, the principal issue is whether the Railway Labor Act (RLA) and its procedures preempt state court litigation based upon statutory and common law claims extrinsic to the labor agreement. An affirmative answer to that question would have resulted in the diversion to grievance procedures and arbitration of a broad range of state law, and possibly federal law claims. The Hawaiian Supreme Court held that the Railway Labor Act does not require that result, and the Supreme Court, in a unanimous opinion by Justice Blackmun, agreed. The Court also held that the section 301 preemption principles, as declared in *Lingle*, provide an appropriate framework for addressing preemption under the RLA.

Grant Norris was employed as a mechanic by Hawaiian Airlines, in a bargaining unit represented by the IAM. He was suspended and thereafter terminated, according to his complaint, because he refused to sign off on the repair of an axle sleeve that he believed remained unsafe, and because he reported his opinion to the Federal Aviation

40. 114 S. Ct. at 2081.
41. 482 U.S. 1 (1987).
42. *Livadas*, 114 S. Ct. at 2082.
43. *Id.* at 2083.
44. *Id.* at 2083–84.
45. 114 S. Ct. 2239.

Authority (FAA). He filed a grievance, but while the grievance was pending he filed suit, claiming (so far as relevant here) that he had been fired in retaliation for his refusal to sign off and for reporting to the FAA. He invoked both the Hawaii Whistleblower Act and common law wrongful termination principles.

Hawaiian Airlines contended that the conflict over Norris' firing was a minor dispute under the Railway Labor Act, and therefore subject to resolution only through RLA mechanisms, including the carrier's internal dispute-resolution processes and the adjustment board established by the employer and the unions. It pointed to the language of 45 U.S.C. § 151(a), which refers to disputes which "gro[w] out of grievances or out of the interpretation or application of agreements . . . ,"[46] and argued that the disjunctive implied that the universe of grievances was broader than disputes over the agreement, otherwise the word "or" was surperfluous.

The Court responded that if the word "grievances" embraced all employment-related disputes, as the airline contended, it would then overlap with the subset of grievances arising out of the interpretation or application of the agreement, and render the word "or" surplusage.[47] It was more likely that the word "grievance" was used in its common labor-law meaning as a dispute arising out of the agreement.[48] This interpretation was in accord with the practice of the adjustment boards under the Railway Labor Act to confine themselves to contract disputes, and there was no evidence of congressional intent broadly to preempt substantive state law protections independent of the agreement.[49]

Finally, the court observed that prior case law confirmed that interpretation, and that it reflected a standard "virtually identical to the preemption standard the Court employs in cases involving Section 301 of the LMRA."[50] Accordingly, the Court expressly adopted the *Lingle* standard, for RLA preemption purposes, which it characterized as calling for preemption "only if a state-law claim is dependent on the interpretation of a collective bargaining agreement."[51]

In reaching that conclusion, the Court disavowed dicta in *Elgin, J. & E.R. Co. v. Burley,*[52] which referred vaguely to minor disputes as including the "omitted case;" that is, one "founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective bargaining agreement, e.g. claims on account of personal injury."[53] And, it distinguished *Consolidated Rail Corp. v.*

46. Railway Labor Act, 45 U.S.C. § 153(i).
47. *Norris*, 114 S. Ct. at 2244.
48. *Id.*
49. *Id.*
50. *Id.* at 2247.
51. *Id.* at 2249.
52. 325 U.S. 711 (1945).
53. *Norris*, 114 S. Ct. at 2250.

Railway Labor Executives Association[54] (*Conrail*), in which the court decided that a worker's challenge to the railroad's drug testing policies involved a minor dispute even though the agreement contained no express language that addressed drug testing. The Court observed that the parties in *Conrail* agreed that the challenge was governed by the RLA because Conrail's policy of conducting physical examinations was an implied term of the collective bargaining agreement.[55] The issue in the case was not preemption, but whether the dispute was a major or minor one, and the Court held it was minor because it could be "conclusively resolved by interpreting the existing [CBA]."[56]

The airline also relied upon language in *Conrail* that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is *arguably justified* by the terms of the parties' collective bargaining agreement."[57] It argued that Norris' termination was arguably justified by the agreement's "just cause" provision and was thus a minor dispute. The Court disagreed, noting that the "arguably justified" standard in *Conrail* was employed only for policing the line between major and minor disputes.[58]

Finally, the Court applied the *Lingle* test to Norris' complaint, and concluded that no issue of contract interpretation was involved. The agreement contained a provision that an aircraft mechanic "may be required to sign work records in connection with the work he performs," but as the Court noted, the issue to be determined was not whether Norris' discharge was justified by his failure to sign the maintenance record, but whether he was fired in retaliation for conduct protected by Hawaii's whistleblower statute or applicable public policy.[59]

The significance of the case lies in its rejection of the airline's preemption argument. If that argument had been accepted, and all state law claims pertaining to the employment relationship were channeled into arbitration under the Railway Labor Act as a matter of law, the effect would have been to develop a major cleavage between the Railway Labor Act and the National Labor Relations Act—one that would likely develop a strong gravitational pull away from the *Alexander v. Gardner-Denver*[60] distinction between statutory and contract claims. Indeed, many read the Court's prior opinion in *Gilmer v. Interstate/Johnson*,[61] which upheld an agreement in the securities industry to arbitrate an age discrimination claim, as signalling the death of *Alex-*

54. 491 U.S. 299 (1989).
55. 114 S. Ct. at 2250.
56. Consolidated Rail Corp. v. Railway Labor Exec. Ass'n, 491 U.S. 299, 305 (1989).
57. *Norris*, 114 S. Ct. at 2250.
58. *Id.*
59. 114 S. Ct. at 2251.
60. 415 U.S. 36 (1974) (holding that neither the existence nor utilization of a collective bargaining arbitration provision bars a suit for discrimination under Title VII).
61. 500 U.S. 20 (1991).

ander and a judicial enthusiasm for pushing and shoving all disputes out of court and into arbitration. This opinion, along with *Livadas*, suggests that the Court is distancing itself from that current.

IV. Public Sector Labor Law

Waters v. Churchill[62]

This case involved invocation of the First Amendment by a public employee who claimed she was fired for constitutionally protected speech—a recurring issue for the Court, except that here the question the Court chose to address was not the substantive scope of First Amendment protection (though the controlling plurality opinion may bear implications for that issue as well), but the standards and procedure for determining, in the event of dispute, what the employee actually said.

Cheryl Churchill, a nurse at a public hospital, was fired for a conversation she had during a dinner break at the hospital with another nurse who was considering transferring to her department, which was obstetrics. In deciding to fire her, hospital authorities relied upon reports from other employees that in the disputed conversation Ms. Churchill had been generally negative about the obstetrics department and about Ms. Churchill's supervisor, Ms. Waters, whom she accused of treating her unfairly. If that version of the conversation was correct, then Ms. Churchill's claim to First Amendment protection was weak.

Ms. Churchill, however, contended (with support from some witnesses) that the conversation consisted entirely of her critique of the hospital's "cross-training" policy, which permitted nurses from one department to work in another when their usual location was overstaffed. Ms. Churchill was of the view that the cross-training policy threatened patient care. If her version of the conversation were accepted, then arguably her speech would have entailed a matter of "public concern" and thus would be within the ambit of *prima facie* First Amendment protection under the principles of *Connick v. Myers*.[63] Such a characterization would not necessarily result in victory for Ms. Churchill, since the Court's doctrine calls for a "balancing" of interests even when the "public concern" requirement is met, but her foot would have been solidly within the courthouse door.

On review of the district court's order granting summary judgment for the hospital in Ms. Churchill's section 1983 action, the Seventh Circuit concluded that the scope of First Amendment protection should depend upon what was actually said, rather than on what the employer thought was said, and on that basis held that Ms. Churchill was entitled to proceed to trial. In the Supreme Court, only Justice Stevens,

62. 114 S. Ct. 1878 (1994).
63. 461 U.S. 138 (1983).

joined by Justice Blackmun, adhered to that view. Justice Scalia, joined by Justices Kennedy and Thomas, were of the opposite view: The First Amendment protects against "retaliation" for protected speech, and an employer could not be said to be "retaliating" for speech of which he was in fact unaware.

That left four Justices, and these, in a plurality opinion by Justice O'Connor, opted for a middle ground that became the judgment of the Court. They rejected the Seventh Circuit view as giving "insufficient weight to the government's interest in efficient employment decision-making,"[64] and they rejected the Scalia position as being insufficiently protective of First Amendment values.[65] What the employer in good faith thought was said should control First Amendment analysis, they concluded, but only if the employer acted "reasonably" in ascertaining the facts (i.e., with the sort of "care that a reasonable manager would use before making an employment decision").[66]

Applying that test, the plurality concluded that the investigation that the hospital conducted, and that included interviews with two witnesses as well as with Ms. Churchill, was "entirely reasonable," so the hospital was entitled to act on the basis of the speech as reported by witnesses it interviewed.[67] And, on that basis, discipline of Ms. Churchill was permissible even if the conversation also included arguably protected speech, for "the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had."[68]

Therefore, end of case? Not quite. The plurality (and therefore the Court), ended up affirming reversal of the summary judgment because there remained a question whether the hospital in fact discharged Ms. Churchill for her unprotected speech or, as she contended, for her nondisruptive statements about cross-training that management thought she may have made in the same conversation, or because of other statements she may have made earlier.[69] If that were the case, then the Court on remand would have to determine whether *those* statements were protected speech, "a different matter than the one before us now."[70]

If the plurality opinion does little to clarify the scope of First Amendment protection for public employee speech, it does make at least a serious attempt to locate its analysis within the general framework of First Amendment doctrine. Starting with the observation that "it is important

64. 114 S. Ct. at 1888.
65. *Id.* at 1889.
66. *Id.*
67. *Id.* at 1890.
68. *Id.*
69. 114 S. Ct. at 1891.
70. *Id.*

to ensure not only that the substantive First Amendment standards are sound but also that they are applied through reliable procedures,"[71] and proceeding to acknowledge the lack of any "general test for determining when a procedural safeguard is required,"[72] the opinion advances a modest proposition: that "the propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."[73] Turning to the context of public employment, Justice O'Connor then asks rhetorically "[w]hat is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?"[74] The answer:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. . . . The Government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[75]

It is this efficiency analysis that underlies the plurality's rejection of the Seventh Circuit's view. It is an analysis that is likely to influence the development of First Amendment law as applied to the substance of protection for public employees as well as procedure, and it is an analysis not likely to enlarge the scope of that protection.

United States Department of Labor v. Federal Labor Relations Authority[76]

This is another opinion by Justice Thomas on union access to employees, and on the limits of agency discretion. The question is whether a union representing employees of a federal agency may obtain from the agency the names and home addresses of bargaining unit employees. The Federal Labor Relations Authority said yes, on the basis of the Federal Service Labor Management Relations statute provision section 7114(b)(4), which requires that an agency make available "to the extent not prohibited by law," information that is "necessary for collective bargaining purposes."[77] The Fifth Circuit said yes as well. The Supreme Court says no, or at least not on the basis of the arguments that

71. *Id.* at 1884.
72. *Id.* at 1885.
73. 114 S. Ct. at 1886.
74. *Id.*
75. *Id.* at 1887–88.
76. 114 S. Ct. 1006 (1994).
77. 5 U.S.C. § 7114(b)(4) (1988 & Supp. IV).

the union advanced in this case. The conclusion is unanimous, except for concurring opinions by Justices Souter and Ginsburg.

The reasoning by which the Court reaches its conclusion is a wooden syllogism: The Privacy Act of 1974 prohibits disclosure of certain government records (including addresses of employees) except (as relevant to this analysis) for information required to be disclosed by the Freedom of Information Act (FOIA).[78] FOIA does not require disclosure of files which would constitute a "clearly unwarranted invasion of personal privacy," and a prior decision, *Department of Justice v. Reporters Committee*[79] held that determining whether an invasion of personal privacy is "warranted" depends upon the extent of the public interest in the information.[80] While unions representing federal employees may have a substantial interest in the names and addresses of unit employees, the public as such does not; therefore, the balance tips toward privacy, and disclosure of the information would be "prohibited by law" within the meaning of the federal labor statute.[81]

The result, as Justice Thomas acknowledges, is to deprive public sector federal unions of information to which their private sector counterparts are presumptively entitled. That result, as Justice Ginsburg observes in her concurring opinion, is almost certainly contrary to any reasonable congressional intent. The Fifth Circuit offered a way out of that absurd result: the reasoning of *Reporters Committee* should be limited to situations in which access to the information is not supported by another federal statute. Nevertheless, Justice Thomas' opinion rejected that offer, which he characterized as an "ambitious invitation to rewrite the statutes before us and to disregard the FOIA principles reaffirmed in *Reporters Committee*."[82] Thus, the Court concluded, "the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant. . . ."[83]

The implications of the opinion are uncertain. The Court took note of the union's argument that the result the Court adopted would deprive unions of access to other information, such as disciplinary reports and performance appraisals, and responded with a shrug, saying "[t]his concern is not presented in this case . . . and we do not address it."[84] The Privacy Act contains other exceptions which the Court declined to consider, such as an exception for "routine use"; and perhaps, as Justice Souter suggests in a brief concurrence, some relief

78. 114 S. Ct. at 1012.
79. 489 U.S. 749 (1989).
80. *Id.*
81. *Id.* at 1013.
82. *Id.* at 1014.
83. *Id.*
84. 114 S. Ct. at 1016.

lies in that direction. Otherwise, as Justice Ginsberg suggests in her concurrence, "Congress may correct the disparity."[85]

V. Employment Discrimination

Landgraf v. USI Film Products;[86] *Rivers v. Roadway Express*[87]

If anything was clear from the legislative history of the 1991 Civil Rights Act, and from the ambiguity of the statute itself, it was that Congress deliberately ducked the question of the statute's retroactive application. In *Landgraf*, the Supreme Court addressed that question with respect to section 102 of the Act, which makes compensatory and punitive damages available for intentional violations of Title VII, and in *Rivers* with respect to section 101, which "overruled" *Patterson v. McLean Credit Union*,[88] and makes clear that the Civil Rights Act of 1866[89] (section 1981) extends beyond hiring discrimination to discrimination occurring during the employment relationship. In what was a blow to plaintiffs, but probably not a surprise to anyone, the Court held that neither section is applicable to cases arising prior to November 21, 1991, the date when the 1991 Act became law. In both cases Justice Stevens wrote the opinion for the court; Justice Scalia joined by Justices Kennedy and Thomas, concurred separately; and Justice Blackmun dissented. Both cases illustrate the limits of textual argument, as well as the vagaries of precedent.

The Court chose *Landgraf*, a sexual harassment case, to explicate its analysis. As the Court acknowledged, there were "canons of statutory construction" that pointed in both directions.[90] The 1991 Act provides explicitly for nonretroactivity with respect to applying Title VII to the operations of employers overseas (section 109), and with respect to the *Wards Cove* case itself (section 402(b)),[91] thus providing support for the familiar "expressio unius" argument. There was the language of section 401(a): "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[92] And, there was the "rule" declared in *Bradley v. Richmond School Board* that "a court is to apply the law in effect at the time

85. *Id.* at 1019.
86. 114 S. Ct. 1483 (1994).
87. 114 S. Ct. 1510 (1994).
88. 491 U.S. 164 (1989) (holding that section 1981's protection against racial discrimination of the right "to make and enforce contracts" applies only to discrimination in hiring, and does not extend to post-hiring decisions such as promotion or dismissal).
89. 42 U.S.C. § 1981 (1866).
90. 114 S. Ct. at 1496.
91. In *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) the court interpreted Title 7 in such a way as to place substantial obstacles in the way of plaintiffs seeking to establish discrimination on a "disparate impact" theory. The 1991 Act was aimed, in part, at removing those obstacles.
92. Civil Rights Act, 42 U.S.C. § 401(a) (1991).

it renders its decision."[93] On the other hand, there was the axiom that "[r]etroactivity is not favored in the law and its interpretive corollary that 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result'."[94] As the Court acknowledged, and as Professor Llewelyn pointed out in his famous article on "rules" of statutory construction,[95] there is a canon for every occasion.[96]

In the end, it was the "presumption against retroactive legislation"[97] that carried the day—a presumption the Court found to be rooted in "elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly,"[98] a presumption that can be overcome only by a clear expression of congressional intent which, of course, was found to be lacking.

End of case? Not quite. After all, as Justice Blackmun points out forcefully in his dissent, the damage provisions of section 102 did not deprive USI Film Products of an opportunity to know what the substantive law was (i.e., sexual harassment was just as unlawful before the 1991 Act as after).[99] The "presumption against retroactive legislation" fails as a default rule unless it contains criteria for identifying when legislation is "retroactive," and that is a gap that the Court recognizes. A statute "does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," says Justice Stevens, nor even that it "upsets expectations based in prior law," since even otherwise prospective statutes may unsettle expectations.[100] "Rather, the court must ask *whether the new provision attaches new legal consequences to events completed before its enactment.*"[101]

Is *that* the end of the case? Still not quite. As the Court also recognizes, "any test of retroactivity will leave room for disagreement in hard cases."[102] In a variety of situations the Court had upheld the application of new statutes to existing cases even in the absence of a clear indication of congressional intent to do so. Indeed, in the *Bradley* case, the Court held that a new law providing for recovery of attorney fees in school desegregation cases should be applied to a pending matter. So what is the test of "retroactivity?" It is, says Justice Stevens, "*whether*

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93. 416 U.S. 696

94. *Landgraf*, 114 S. Ct. at 1496 (*quoting* Bowen v. Georgetown Univ. Hosp., 433 U.S. 204, 208 (1988)).

95. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

96. 114 S. Ct. at 1496.

97. *Id.* at 1497.

98. *Id.*

99. *Id.* at 1510.

100. *Id.* at 1499.

101. 114 S. Ct. at 1499 (emphasis added).

102. *Id.*

[the new statute] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[103]

Justice Stevens concludes in *Landgraf* that application of section 102 to pending cases would involve retroactivity as the Court defines it. Indeed, retroactive application of the punitive damage provisions of section 102, because of their similarity to criminal sanctions, would raise a serious constitutional question. The issue with respect to compensatory damages he acknowledges to be more difficult, but because compensatory damages are "quintessentially backward-looking" (meaning that they affect the liabilities of defendants), and because they are "the type of legal change that would have an impact on private parties' planning" (meaning that had USI Film Products known of its potential liability for failing to take preventive action it might have done so), the new damage provisions would operate "retrospectively" if applied to conduct occurring before November 21, 1991.[104]

In *Rivers*, the Court found the presumption of nonretroactivity "even more clearly applicable" to section 101 because, rather than simply increase the amount of damages recoverable for prohibited conduct, that section enlarged the category of conduct subject to liability. The fact that section 101 was designed to overturn a prior judicial interpretation, and was thus in a sense "restorative" in nature—an aspect of the case emphasized by the plaintiff and by Justice Blackmun's dissent—was not sufficient to overcome the presumption in the absence of a "clear expression of congressional intent to reach cases that arose before its enactment."[105] For the majority, such an expression of congressional intent could, in principle, be found in legislative history as well as in the language of the statute; Justice Scalia, joined by two Justices who share his skepticism about reliance on legislative history, wrote separately in both cases to express disagreement with that proposition.

Whether the opinions in *Landgraf* and *Rivers* leave room for the retroactive application of any other provisions of the 1991 Act is an issue that will no doubt engage the lower courts for some time. *Landgraf* distinguishes statutes that authorize or affect the propriety of "prospective relief" such as injunctions (*Ex parte Collett*), as well as changes in "procedural rules" such as rules "governing the transfer of an action" (*Ex parte Collett*) or an award of additional attorney fees not previously available (*Bradley v. Richmond School Board*). The opinion also makes clear that "there is no special reason to think that all the diverse provisions of the Act must be treated uniformly" with respect to

103. *Id.*
104. *Id.* at 1506.
105. 114 S. Ct. at 1516.

retroactive application.[106] The provisions of the Act relating to prejudgment interest, expert fees, suit-filing periods, and perhaps even aspects of the *Wards Cove* amendments arguably fall within the area of permissible retroactivity.

One incidental aspect of the *Landgraf* opinion may carry implications for sexual harassment law. Footnote thirty-five of the opinion asserts that prior to the 1991 Act the law "imposed no liability on an employer who corrected discriminatory work conditions before the conditions became so severe as to result in the victim's constructive discharge. Assessing damages against respondents on a theory of *respondeat superior* would thus entail an element of surprise."[107]

Harris v. Forklift Systems[108]

What is most surprising about *Harris* is the speed with which the opinion was rendered (less than a month after oral argument) and its brevity (about two pages). What is not surprising is the result. Undertaking to resolve a conflict among the circuits as to whether or not a plaintiff in an "abusive work environment" harassment case under Title VII must demonstrate that her psychological well being was seriously affected, or indeed that she suffered injury as a result of the harassment, the Court in an opinion by Justice O'Connor concludes unanimously that she need not. Given the facts of the case—a company president referred to Teresa Harris as a "dumb-ass woman," suggested in front of others that the two of them go the Holiday Inn to negotiate her salary, made sexual innuendos about women's clothing, asked female employees to get coins from his front pants pocket, and finally (after promising to stop) insinuated that she had promised a customer sex to arrange a deal—the Court, if it had reached a contrary result, would have looked pretty silly.

More significant than this negative conclusion is what the Court says the standard *is* for establishing a case of hostile or abusive work environment: The plaintiff will prevail, the Court says, if she can demonstrate that the environment is one "that a reasonable person would find hostile or abusive" and that the plaintiff subjectively perceives as being abusive.[109] Whether a work environment is "hostile" or "abusive" (apparently the terms are synonymous) depends upon consideration of "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,"[110] but not

106. *Landgraf*, 114 S. Ct. at 1505.
107. 114 S. Ct. at 1506 n.35.
108. 114 S. Ct. 367 (1993).
109. 114 S. Ct. at 370.
110. *Id.* at 371.

one of these is essential to the characterization.[111] The effect on the plaintiff's psychological well-being may be relevant to determining whether she actually found the environment abusive, but it is not otherwise an essential part of the cause of action.

Justice Scalia concurred separately, apparently to apologize for agreeing to such a vague, multifactored standard. Justice Ginsburg also concurred separately, apparently to have a text from which to append a footnote observing that the standard for review of gender discrimination under the equal protection clause (which was not involved in the *Harris* case) is still an open question in the Supreme Court.

The lead opinion is as sparse as it is brief. Acknowledging (in what must be the lead understatement of the term) that the announced test for identifying a hostile work environment is not "mathematically precise," the opinion disclaims the necessity of answering "all the potential questions it raises," or of addressing the EEOC's new proposed regulations on the subject.[112] The opinion thus leaves open the validity of the "reasonable victim" standard adopted by some courts, though arguably its adoption of the "reasonable person" language is intended to supplant that formula.

The sparseness of the opinion is understandable, however, in light of the fact that the whole area of sexual harassment law will shortly take on new dimensions—including the potential for damages and jury trials—as a result of the 1991 Act. Presumably juries will now be instructed in the language of *Harris*, and as Justice Scalia kvetches about but nevertheless accepts for lack of textually supported alternatives, *Harris* "lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[113] Perhaps, Justice Scalia notwithstanding, that is not such a bad result.

VI. Longshore and Harbor Workers Compensation Act

Howlett v. Birkdale Shipping Co.[114]

In a decision likely to make it more difficult for plaintiffs to recover in third-party actions against a shipowner under the Longshore and Harbor Workers Compensation Act,[115] the Court held unanimously, in an opinion by Justice Kennedy, that the Act does not impose a duty upon shipowners to inspect the cargo held for possible defects.

Albert Howlett, a longshoreman employed in the Port of Philadelphia by a stevedoring firm, was injured while unloading bags of cocoa

111. *Id.*
112. 114 S. Ct. at 371.
113. *Id.* at 372.
114. 114 S. Ct. 2057 (1994).
115. 33 U.S.C.A. § 901 (1994).

beans from a cargo hold on a ship owned and operated by Birkdale. Evidence showed that the stevedoring firm engaged by Birkdale to load the cocoa beans in Ecuador had lined the deck under the cocoa beans with plastic, rather than with the customary paper and plywood, and that this contributed to Howlett's accident. Evidence also showed that Birkdale had supplied the Ecuadorian stevedore with the plastic, along with other material used in stowing cargo, including paper and plywood. Howlett sued Birkdale under section 5(b) of the Act, alleging that Birkdale was negligent for failing to warn the Philadelphia stevedoring firm and its employees of this dangerous condition.

Section 5(b) permits suit by an injured worker against the vessel as a third party for damages resulting from an injury caused by the negligence of a vessel.[116] Section 5(b) has been held to encompass a "turnover duty," which entails a duty to warn the stevedore of hazards that are known or should be known in the exercise of reasonable care.[117] The district court in Howlett's case granted summary judgment in favor of Birkdale on the ground that the evidence was insufficient to support a finding of actual knowledge by Birkdale of the dangerous condition of the hold; or if there was actual knowledge because members of the crew were present on the top deck during the loading operation, then it was an "open and obvious condition" for which no duty to warn existed.[118] The court of appeals affirmed without opinion, and the Supreme Court affirmed as well.

The Court held that "the exercise of reasonable care does not require the shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow."[119] It rejected Howlett's reliance upon "land-based" Restatement of Tort principles as not furnishing "sure guidance" in maritime cases, and as in any event contrary to the Court's prior decision in *Scandia Steam Navigation Co. v. De los Santos*, which held that a vessel has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.[120] While *Scandia* involved the shipowner's duty to intervene in the stevedoring operations, the Court held that its principles are applicable to the turnover duty as well.[121] A contrary rule, the court opined, would undermine Congress' intent to

116. *Howlett*, 114 S. Ct. 2057, 2062.
117. Federal Marine Terminals Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969).
118. 114 S. Ct. at 2062.
119. 415 U.S. 156 (1981).
120. *Howelett*, 114 S. Ct. at 2064.
121. *Id.*

eliminate the vessel's nondelegable duty to protect longshoremen from the negligence of others.[122]

Nonetheless, the Court found that there remained an issue, not addressed by the courts below, as to Howlett's contention that the alleged hazard would have been neither obvious to nor anticipated by a skilled and competent stevedore at the *discharge port*, which was Philadelphia. Accordingly, the judgment of the court of appeals was vacated, and the case remanded for further proceedings.

VII. Labor Injunctions

United Mine Workers v. Bagwell[123]

The distinction between "civil contempt" (requiring only notice and an opportunity to be heard) and "criminal contempt" (with right to trial by jury) has always been a blurry one, and the Court's opinion in *Bagwell* does little to clarify. It does hold that fines in excess of $52 million, imposed against the UMW by a Virginia trial court for violation of its order enjoining unlawful strike-related activities against certain mining companies, were criminal in nature and could be imposed only through a jury trial. Justice Blackmun wrote the opinion for the Court; Justice Scalia filed a concurring opinion, and Justice Ginsburg, joined by Justice Rehnquist, filed an opinion concurring in part.

The UMW was in dispute with Clinchfield Coal Company and Sea "B" Mining Company over alleged unfair labor practices. In April 1989, the trial court enjoined the union from blocking ingress or egress to company facilities, from picketing with more than a specified number of pickets at designated sites, from throwing objects at and physically threatening company employees, and from placing tire-damaging "jackrocks" on roads used by company vehicles. In May, the court held a contempt hearing, found that the union had committed seventy-two violations of the injunction, imposed a fine of $642,000, and warned that future violations would be punished with "civil fines" at the rate of $100,000 per violent breach and $20,000 per nonviolent infraction. Confronted with what he found to be subsequent contumacious acts, the trial judge ordered the union to pay fines in the amount of $12 million to the companies and roughly $52 million in fines to the Commonwealth of Virginia and the counties in which the unlawful acts occurred. While the judge articulated a "beyond a reasonable doubt" standard, no jury was permitted. The judge subsequently vacated the order of $12 million.

Justice Blackmun's opinion explores the tension between the traditional justification for the relative breadth of the civil contempt power (institutional necessity), and the risk of abuse inherent in permitting the judge who issued the order to evaluate and impose sanctions for its

122. 114 S. Ct. at 2065.
123. 114 S. Ct. 2552 (1994).

violation. The opinion also observes that the necessity justification is most powerful when the Court is punishing "petty, direct contempt in the presence of the court"[124] and least persuasive when the contempt involves "out-of-court disobedience to complex injunctions [which often] require elaborate and reliable fact finding."[125] However, rejecting both the union's contention that the contempt should be characterized as criminal because the injunction was primarily prohibitory rather than mandatory in nature and the contention of respondent Bagwell (the special commissioner appointed to collect the fines) that the the contempt should be characterized as civil because the trial judge announced in advance the fines that he would impose, the Court concluded that the contempt in this case was criminal because (1) the conduct "did not occur in the court's presence or otherwise implicate the court's ability to maintain order and adjudicate the proceedings before it"; (2) the union's contumacy involved "widespread, ongoing, out-of-court violations of a complex injunction" rather than "simple affirmative acts"; and (3) the fines assessed were "serious, totalling over $52,000,000."[126] This conclusion, the Court cautioned, did not preclude the imposition of "petty fines" under similar circumstances.[127] Where is the line between a "serious fine" and a "petty fine"? Noting that it had held a fine of $10,000 imposed on a union was insufficient to trigger a jury trial, the Court stated "[w]e need not answer [that difficult question] today."[128]

Justice Scalia concurred in the result, noting that the contempt in this case was criminal by any of the "not easily reconcilable" tests previously announced, but advocated a test based upon historical distinctions between "a discrete command observance of which is readily ascertained" and a "modern complex decree."[129] Justice Ginsburg, joined by the Chief Justice, also concurred, emphasizing the Virginia courts' refusal to vacate the fines despite the parties' settlement and joint motion asking the courts to do so.

Madsen v. Women's Health Center[130]

While not a labor case, Justice Rehnquist's opinion for the Court in *Masden*, upholding certain restrictions on picketing and other activities by anti-abortion groups in relation to a Florida abortion clinic, and striking down others, has implications for the application of the First Amendment to labor picketing as well.

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124. 114 S. Ct. at 2560.
125. *Id.*
126. *Id.* at 2562.
127. *Id.* at 2563.
128. *Id.* at 2562 n.5.
129. 114 S. Ct. 2565.
130. 114 S. Ct. 2516 (1994).

The Court finds that the injunction is not "content-based" within the meaning of general First Amendment principles simply because it is aimed at a particular group that has been engaged in unlawful acts, so that strict scrutiny is not required; but the court also holds that an injunction is subject to a higher level of scrutiny than the "narrowly tailored to serve a significant government interest" test applicable to time, place, and manner restrictions in public fora.[131] The Court adopts as the appropriate standard a new test: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[132]

Applying that test, the Court upholds a part of the injunction prohibiting "congregating, picketing, patrolling, demonstrating or entering" any portion of the right of way within thirty-six feet of the clinic. In view of the failure of a previous injunction to protect access to the clinic, and in the absence of other alternatives, the establishment of such a buffer zone was justified.

The Court also upheld portions of the injunction prohibiting "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns sound amplification equipment or other sounds . . . within earshot of the patients inside the clinic" during the hours of 7:30 a.m. to 12 noon, as being necessary to ensure the health and well-being of the patients.[133]

But the Court struck down the buffer zone insofar as it applied to picketing or congregating in proximity to private property, as there was no evidence of unlawful activities in that area. It struck down a portion of the injunction prohibiting the use of "images observable" to patients during the morning hours; it invalidated a prohibition on all uninvited approaches of persons seeking the services of the clinic; and, it held that a prohibition of picketing within 300 feet of the residences of clinic staff was overly broad.[134]

Each of these provisions has counterparts in the typical labor injunction, and while the contexts are in some respects different it may be expected that lower courts will look to *Masden* for guidance with regard to First Amendment limitations in that area as well.

VII. Conclusion

Viewed collectively, last Term's labor and employment law cases were like a medium quality novel, adequate to hold one's interest, but not likely to make a real difference in one's life. Except for *Landgraf* and *Rivers* (which had immediate impact on pending litigation under the 1991 Civil Rights Act), the cases or at least the manner in which the

131. 114 S. Ct. at 2525.
132. *Id.*
133. *Id.* at 2528.
134. *Id.* at 2528, 2529.

Court approached and decided them, dealt mainly with issues peripheral to the interests of most practitioners and, more significantly, to the interests of most employers, unions, and workers. The one opinion that addressed an area truly in need of the Court's attention—section 301 preemption—did so in such an oblique way as to stimulate rather than satisfy the reader's appetite for a coherent solution.

I suspect that most practitioners and academics would agree upon the important issues most in need of guidance from the Supreme Court. The problem is that in seeking grants of certiorari the labor and employment law field competes with all other fields for what has become, in light of the Court's paring of its caseload, an increasingly scarce resource. Perhaps the Labor and Employment Law Section of the American Bar Association could assist the Court as *amicus curiae* by identifying those issues, posed in pending *cert* petitions, deserving of priority. I realize this would be a sensitive enterprise, and a challenge to the delicate balance upon which the Section depends for its existence, but I would think it a feasible project nonetheless, and one well worth undertaking.